IN THE

Supreme Court of the United States

October Term, 1958

No. 61

JOHN H. CRUMADY,

Petitioner,

AGAINST

JOACHIM HENDRIK FISSER, Her Engines, Tackle, Apparel, etc., and JOACHIM HENDRIK FISSER and/or HENDRIK FISSER,

Respondents,

AGAINST

NACIREMA OPERATING CO., INC.,

Impleaded Respondent.

Brief of Respondents in Opposition to Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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OPINIONS BELOW

The opinion of the United States District Court for the District of New Jersey is reported at 142 F. Supp. 389. The opinion of the Court of Appeals for the Third Circuit is reported at 249 F. 2d 818. The opinion of the Court of Appeals on the petition for a rehearing is reported at 249 F. 2d 821.

Jurisdiction

It is not disputed that there is jurisdiction under Title 28 U. S. C., Section 1254(1). However, the petition fails to establish that there exist any of the grounds for granting a writ set forth in Rule 19 of the Revised Rules of this Court.

Questions Presented

1. Whether this Court should review a theory which was not advanced below and which requires the rejection of findings concurred in by the courts below and substitution of new findings therefor based on matters having no foundation in the record.
2. Whether this Court should review the decision of the Court of Appeals because on an application for a rehearing, it refused to adopt a theory of liability which was not advanced in the trial court or on appeal and was foreign to the general maritime law and was in conflict with the whole rationale of the decisions of this Court on the subject.
3. Whether this Court should, on the basis of statements outside the record, review a reversal by the Court of Appeals of a holding by the trial court which was unsupported by the evidence, contrary thereto and contrary to law where the findings of the trial court and the undisputed facts show that the holding of the trial court was clearly erroneous.

Statement

It is necessary to point out at the outset that the petition does not present accurately the true issues in this case but attempts to obtain a review of matters which were not advanced below but have been formulated solely for the purpose of this proceeding. Furthermore, it challenges the findings of the court below not on the basis of the record but by resorting to expressions of personal opinions and beliefs which have no foundation in the record and are contrary thereto.

Each of petitioner's arguments is based on the false premise that the only part the stevedores played in causing his accident was that of changing the position of the boom and that this was their only connection with the creation of the excessive strain which caused a safe and seaworthy topping lift cable to break. Nowhere in the entire petition does petitioner even acknowledge that, in fact, the trial court concluded as a matter of law that the sole, active and primary cause of the excessive strain on the topping lift was the negligent manner in which the longshoremen attempted to extract a timber, which they had permitted to jam on the underlip of the vessel's hatch coaming, from such obstructed position beneath the deck of the vessel (142 F. S. 389, 401). As to this finding, with which the Court of Appeals concurred (249 F. 2d 818, 819), the petition is significantly silent.

Having omitted this vital finding, petitioner formulates his own theory as to why the Court of Appeals exonerated the vessel. At page 11 of the petition, petitioner asserts that the sole basis upon which the holding of the lower court, exonerating the shipowner, rests is that the shipowner temporarily surrendered control of the vessel to the intermediate employer. He then attacks the holding

of the Court of Appeals on this theory and urges not only that a writ be granted but also that this Court reverse the decision below on the ground that the holding is contrary to certain decisions of this Court and other lower courts which had dealt with the "concept of control" theory. This part of petitioner's argument, however, is misdirected because the Court of Appeals did not exonerate the vessel on the basis of a temporary surrender of control but *"because the gear was not proved to have been unseaworthy, neither was the setting of the cut-off device established as a legal cause of the accident which occurred"* (249 F. 2d 818, 821). (Emphasis supplied.)

Again omitting the vital finding as to the real cause of the excessive strain, the petitioner at page 27 of his petition asserts that the trial judge found that "the excessive strain was due to two factors: (a) the excessive setting of the cut-off device which failed to stop the winch when the weight of the load exceeded three tons; and (b) the defective condition of the rigging which placed a somewhat greater strain on the topping lift than on the other gear; that those factors combined to cause the cable to break". This, however, again was not the finding of the trial court as to the cause of the strain. Instead, the trial court held that after the longshoremen had caused the timber to become jammed, "the continued application of power to the winch imposed upon the topping lift of the boom such an excessive strain as to cause it to break and the boom to fall". Nor did the trial court hold that the manner of rigging combined with the setting of the cut-off device cause the cable to break. The only way in which the setting of the cut-off device became involved, according to the trial court, was that it was "brought into play" by the stevedores' failure to exercise care in conducting the unloading operations.

The Court of Appeals properly held that under such circumstances the setting of the cut-off device was not established as a legal cause of the accident and that it did not render the vessel unseaworthy because "The concept of seaworthiness contemplates no more than that a ship's gear shall be reasonably fit for its intended purpose" (249 F. 2d 818, 821). Seaworthiness does not require that a ship or its gear should be fit for a use for which they were not intended or that they be capable of preventing an eventuality that cannot be reasonably feared or anticipated.

Even petitioner's "Statement of the Facts" obscures the real cause of the breaking of the topping lift cable. It is made to appear that the strain on the topping lift was not due to the attempt of the longshoremen to force the blocked timber but because the cut-off device did not anticipate and prevent the occurrence of the accident. The petitioner describes the occurrence of the accident at page 3 of his petition as follows:

> "Prior to the accident, the stevedores were in the course of hoisting two timbers from a hold of the vessel, when one end of the timbers became wedged and caught under the hatch coaming. As the power in the winch increased the strain on the cables pulling the load, the cut-off device failed to shut off the power within the safe working limits of the gear, and the increasingly excessive strain finally caused the topping lift to break. As a result, the boom fell upon the longshoreman."

Petitioner would have it appear that the fault lay with the cut-off device and not the longshoremen who, being in control of the winch, refused to stop the winch even though further movement of the timber was effectively blocked. Nor is there anything in this statement which indicates

that the longshoremen were using the ship's gear for a purpose for which it was not intended, i.e., to force the timber after they had caused it to become caught on the underedge of the hatch coaming. Instead, it is made to appear that the winch was being operated in a normal manner and that the overstrain arose during the course of that operation and not as a result of operating the winch in an improper manner.

The petitioner would also have it appear that the court below, which heard the initial appeal, was in error because it denied a rehearing. The petitioner merely asserts that the majority of the court dismissed his contention that the vessel must be held liable even if the sole cause of the accident was defective rigging by the longshoremen as being without merit and without further comment. The majority, however, stated (249 F. 2d 818, 821):

> "A petition for rehearing is presented for our consideration on a theory of unseaworthiness which seems not to have been advanced in the trial court and has not heretofore been urged on this appeal. We find no such merit in this or any other contention as would warrant a rehearing. Accordingly, the petition for a rehearing is denied."

That theory was not only different from the one on which the petitioner had originally proceeded in the courts below[1] but also necessitated omissions of findings previ-

1. The Court of Appeals 249 F. 2d 818, 819 pointed out that in the libel petitioner asserted a claim for injury based on the negligence of a ship and its owners and nothing else. On the pretrial conference, it was changed to one of unseaworthiness and it was made clear the structure alleged to have been unseaworthy was the topping lift cable. Thereafter, libelant's proof was directed at establishing that the topping lift was worn and defective and, for that reason, *parted under the strain of lifting cargo* which sound gear would have withstood (italics supplied). In the Court of Appeals, on the original appeal,

ously made and required resort to baseless statements having no foundation in the record.[2] No more compelling reason exists for this Court to re-evaluate the facts to establish a new theory which was not advanced below and which respondent was not required to meet than existed below. The dissent of Chief Judge Biggs furnishes no basis for the granting of a writ here. He did not hear the original appeal and obviously was not fully apprised of the fact that the trial court had found that it was the stevedores' misuse of the ship's gear which was the sole and primary cause of the overstrain on the topping lift.

Statement of the Case

On January 1, 1954, the *SS Joachim Hendrik Fisser*, a German built vessel which had been constructed in 1952, arrived at Port Newark with a cargo of lumber and timbers from Puerto Cabezas, Nicaragua. The respondent vessel was a small dry cargo ship which had only two cargo hatches, one hatch being forward of the midship housing and the other hatch being aft of the midship housing. The two winches and the two booms at the forward or #1 hatch, at which the libelant and his co-workers did the discharging, were located forward of the #1 hatch.

In accordance with international practice, each of these booms contained a marking that the lifting gear and attachments were certified for a safe working load of three tons.

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petitioner still vigorously contended that no negligence of the stevedores caused or contributed to the accident. At this time, he had switched to the contention that the cut-off device was defective.

2. The same baseless statements having no foundation in the record which appear at page 23, footnote 4, were advanced in an attempt to destroy the Coast Guard regulation regarding which two experts had testified without contradiction on the trial.

In accordance with international practice, this was notice to all that in no event was a greater load than three tons to be lifted by this gear.

The power for the lifting gear was supplied by electric winches. They were powered by electric motors with a rated capacity of 18 German horsepower each. In its electrical unit each of the winches was equipped with an electromagnetic instantaneous type cut-off device or circuit breaker. The purpose for which these circuit breakers were installed was to protect the electric motor from burning out when an excessive current might be built up. In other words, they performed the same function as the ordinary household fuse. They had been adjusted by the electrical contractor who installed them and were correlated with the ship's gear after it had been tested. In this case, the cut-off device was set so that the flow of current to the winch motor would be cut off instantaneously when the amperage reached the point where it would be equivalent to the current which the motor would require to overcome the strain of a load on the cargo runner somewhat in excess of six tons. This setting as the Court of Appeals noted was in accord with Coast Guard Regulation 46 C.F.R. Part III. 45-20(b2), which allowed a setting at a point up to 250% of full load current.[3]

Prior to 8 A.M. on January 2, 1954, the vessel's crew raised the port (up-and-down) boom and rigged it in a position with its head above and perpendicular to a point in the center line of the hatch square of hatch #1. When the longshoremen came on board at 8 A.M. on January 2, 1954, they first moved the starboard or burton boom so that its head was over the side of the vessel and above the

3. 250% of full load current would allow a load on the runner of 7½ tons. The setting in the present case limited it to a little over 6 tons.

pier and then proceeded to discharge lumber and timbers from hatch #1. Before they started discharging, the winchman conceded that one of the members of the crew had shown him a switch by means of which he could shut off the power of the winch.

For approximately one hour the longshoremen discharged lumber and timbers from #1 hatch. This discharging was done in the following fashion: The longshoremen first made up a draft of lumber or timber in the hatch and placed wire slings around it. They then hooked the two wire falls which were joined at the lifting end to the slings which were around the draft—one wire fall ran through a block which was at the head of the starboard (burton) boom which had been rigged over the deck and down through a block at the foot of the starboard (burton) boom and around the drum of the starboard winch, and the other passed through a block at the head of the port (up-and-down) boom which was over a point in the center line of the hatch square of #1 hatch, down through a block at the foot of the port (up-and-down) boom and around the drum of the port winch. By first applying the power of the port winch, the draft was raised upward and out of the hatch and then by applying the power of the starboard winch, the draft was transported across the deck of the vessel and lowered down onto the pier by reversing the raising operation and letting up on the runners.

After working in this manner for approximately one hour and just immediately prior to the occurrence of petitioner's accident, the longshoremen, apparently in order to establish a more lateral pull for removing timber from under deck, switched the position of the port (up-and-down) boom so that the head of the boom was then above and perpendicular to a point on the vessel's deck two feet to the port of the port coaming of #1 hatch.

Immediately after the port (up-and-down) boom was moved into this position, the longshoremen attempted to lift two timbers, which measured from 8" x 8" to 12" x 12" in girth and from 30 to 37 feet in length, from the vicinity of the starboard side of the hatch. One of these timbers lay in the open square of the hatch just outside the starboard hatch coaming. The other timber lay about two feet to the starboard of this timber and beneath the overhang of the starboard main deck and just inside the lower projection of the starboard vertical coaming (on the inshore side).

The libelant and a fellow employee placed a double-eyed wire rope sling around these two timbers at a point some two or three feet from the after ends of these two timbers and the two eyes of the sling were then placed upon the cargo hook of the fall which extended from the head of the port (up-and-down) boom in a diagonal towards the starboard after end of the hatch where this sling around the timbers was located. As soon as this was done, libelant's co-worker gave two signals to the port (up-and-down) winchman. The first was to take up the slack on the fall. After that was done, a second signal was given to lift the timbers.

However, as found by the trial court:

> "• • •, either the taking of the slack or the taking of the strain by the port winchman on the sling which was around the two timbers caused the inshore timber to turn or roll (rather than slide) toward the off shore edge of the underlip of the starboard coaming, or otherwise to become jammed or drawn against the coaming edge, thus effectively blocking the further movement of the timber, and that the continued application of power to the winch

imposed upon the topping lift of the boom such an excessive strain as to cause it to break and the boom to fall."

With respect to petitioner's sole theory of liability that the topping lift cable which supported the boom parted because it was worn and defective and, therefore, parted under the strain of lifting cargo which a sound topping lift cable would have withstood, the trial court made the following finding:

> "Since I am persuaded that the topping-lift which failed, and its condition, is exemplified in the exhibits R-38 and R-39, and since the testimony is uncontradicted that the topping-lift had been in use since the initial rigging of the vessel in June 1952, apparently with the same boom and a cargo runner of the same rated capacity as at the time of the accident, I find that the topping-lift and its manner of rigging, which was in use just prior to the fall of the boom, was adequate and proper for the loads for which the rest of the gear was designed and intended."

From the evidence, the trial court also found that the topping lift parted because a strain of between 17 and 21 tons, or several times the safe working load of the topping lift and other units comprising the unloading gear, had been imposed on it.[4]

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4. This finding and the evidence on which it is based conclusively establishes that the mathematical formula used by the Court of Appeals, by which it arrived at a safe working capacity of 15 tons and which petitioner attacks as incorrect by resorting to what he calls recognized scientific principles set forth at pages 26 and 27 of the petition, is correct. The topping lift cable here did not break until it was subjected to a strain of at least 17 tons and possibly as much as 21 tons. The progressive damage did not begin until the strain was greater than 15 tons. To hold otherwise requires the rejection of the trial court's findings and a reappraisal of the evidence.

Having found that the topping lift cable was adequate and proper for the loads for which the gear was designed and intended, and having found that the topping lift parted because it had been subjected to a strain in excess of its safe working capacity and that this excessive strain which caused the topping lift cable to break was caused by the continued application of the power of the winch after the timber had become effectively blocked from further movement, the trial court in the words of the Court of Appeals, 249 F. 2d 818, 819, then:

> "* * * found and adopted a new theory of ship's unseaworthiness and responsibility which libelant had not pleaded and, so far as we can determine, had not attempted to establish in his proof. * * *"

Under this theory, the trial court labored under the erroneous concept that the warranty of seaworthiness required that ship's gear not only be reasonably fit for its intended purpose but that it also be fit for any eventuality whether it could be reasonably anticipated or not. On the basis of this erroneous concept, the trial court held that the vessel was liable to the petitioner because the negligence of the stevedores brought into play an unseaworthy condition of the vessel and then awarded indemnity to the vessel against the stevedore because the stevedore had breached the duty which it owed to the vessel to exercise reasonable care in conducting its unloading operations.

The Court of Appeals, after concurring with the trial court that the stevedores were negligent in their conduct of the unloading operations, reversed the trial court and dismissed the libel. Having absolved the vessel of liability, the Court of Appeals pointed out that it did not reach the question of whether there would have been legal basis for making the stevedore an indemnitor.

In dismissing the libel, the Court of Appeals pointed out that it was doing so because the vessel's gear was not proved to have been unseaworthy, neither was the setting of the cut-off device established as the legal cause of the accident which occurred.

In its opinion, the Court of Appeals also noted that by changing the position of the head of the boom, the longshoremen distorted the normal composition of forces which is presented by a straight lifting operation. However, the strain of between 17 and 21 tons which the trial court found as a fact, on the basis of expert testimony, did not result from the changing of the position of the boom. Instead, it arose from the strain which was produced on the boom head by the jamming of the timber and the continued operation of the winch. When the timber became jammed and the longshoremen continued to apply the power of the winch, the head of the boom was then being subjected to two forces. One force was in that portion of the runner passing from the jammed timber to the head of the boom and the other from the head of the boom down to the winch. In this way the head of the boom was pulled downward as the power of the winch continued to be applied. The load exerted on the boom head would be the resultant of these two forces which would be translated from the boom head into the topping lift which supported the boom. The force obviously would keep pulling the head of the boom further and further downward. On the other hand, if the timber was not jammed, the only force on the boom head would be that exerted by the load being lifted (N.T. 1443-1446).

This principle can be easily demonstrated by attaching a weight to a piece of string and then passing the string over some object such as a pencil held in a horizontal position. By pulling on the other end of the string, it will be noted that as the weight rises, the pencil is subjected only

to the strain necessary to raise the weight. If the weight, however, is secured to something or jammed so that it cannot move and the other end of the string is pulled, the pencil is subjected to the strain not only of the pull on the string but also by the jamming of the weight and the pencil will be pulled downward.

Thus, even with the position of the boom head altered, the excessive strain still could result only from the application of the power of the winch as the longshoremen tried to force the jammed timber. Therefore, the conclusion of the court below that the gear was not proved unseaworthy, neither was the setting of the cut-off device established as a legal cause of the accident was correct, and its denial of the petition for a rehearing on the basis that there was no merit in the contention made by the petitioner was in all respects proper. In his dissent, Chief Judge Biggs clearly indicated that he was not aware of the real factors which produced the overstrain on the topping lift cable and caused it to break. The present case in no sense involves a question of how long a time elapsed between the positioning of the boom and the occurrence of the accident, nor is it a case for the application of the doctrine to the effect that "a 'seaworthy' round peg placed in a 'seaworthy' square hole will render the whole unseaworthy". It is a pure and simple case of an accident occurring from the use of the ship's equipment for a purpose for which it was not furnished or intended and in failing to stop the winch after it was obvious that the timber was so effectively blocked that unless it was stopped some part of the ship's gear would break.

Reasons for Denying the Writ

(1) The theory on which the petitioner seeks a review in this Court was not advanced in the trial court nor on the original appeal and is without merit because it requires the omission of a finding concurred in by the courts below. Nor is it based on a theory which the respondent was required to meet below. Petitioner would have it now appear that the accident resulted from a proper use of ship's gear and that a defect in the gear caused the accident. The courts below, however, concurred that the excessive strain which was imposed on the vessel's topping lift was produced by the continued application of power to the winch after the timber had become jammed against the hatch coaming and all further movement of the timber had been effectively blocked. It is well established that on appeal the petitioner cannot change his theory to one which was not advanced below and which the respondent was not required to meet below and on such a basis obtain a review by this Court. *Virginia Ry. Co.* v. *Mullens*, 271 U. S. 220, 227, 228. It is also well established that this Court will not review the evidence and make other findings where the courts below have made concurrent findings. *Just* v. *Chambers*, 312 U. S. 383, 385. Since the granting of a writ here would require the consideration of this matter on a theory not advanced or litigated below, and since it would require the rejection of findings made below which are supported by the evidence, no valid basis exists for granting petitioner's application in the present case.

(2) The issues here are uniquely narrow and turn solely on the facts which are peculiar to this case. They present no conflict of opinion and involve no questions which are of public importance and which require resolution by this Court, despite petitioner's attempt to make it so appear.

The petitioner's argument in his First Point (pp. 6-21 of petition) is based on the erroneous concept that the Court of Appeals absolved the vessel because it temporarily surrendered control of the vessel (p. 11 of petition) and is the result of the omission of the finding that the stevedores' negligent operation of the ship's winch in attempting to extract the timber from its obstructed position beneath the deck of the vessel was the sole, active or primary cause of the accident.

None of the cases referred to in the petition stands for the proposition that the vessel is liable for a breach of warranty of seaworthiness when ship's gear which is adequate and proper for the purpose for which it is intended breaks when put to a use for which it was not furnished or intended.

The Court of Appeals correctly applied the principle that the concept of seaworthiness contemplates no more than that a ship's gear shall be reasonably fit for its intended purpose. In *Boudoin* v. *Lykes Brothers Steamship Co.*, 348 U. S. 336, this Court reiterated this principle when it said at page 339:

> "The warranty of seaworthiness does not mean that the ship can weather all storms. It merely means that 'the vessel *is reasonably fit* to carry the cargo' * * *." (Italics supplied.)

The holdings in *Petterson* v. *Alaska S.S. Co.*, 205 F. 2d 478, 479, affirmed sub nom. *Alaska Steamship Co.* v. *Petterson*, 347 U. S. 396; *Seas Shipping Co.* v. *Sieracki*, 328 U. S. 85; *Pope & Talbot* v. *Hawn*, 346 U. S. 406 and *Grillea* v. *United States*, 232 F. 2d 919, are not in conflict with the principle applied by the Court below. In each of these cases it was found that either the ship or its equipment or appliances were not reasonably fit for the use for which they were intended.

In *Petterson* v. *Alaska S.S. Co.*, 205 F. 2d 478, affirmed 347 U. S. 396, the Court of Appeals made special note of the fact that the appliance which broke was used in a customary and usual manner and that it was of a type ordinarily and customarily used and proper for the use to which it was being put upon the occasion in question. The Court found that it broke because it was defective.

In *Seas Shipping Co.* v. *Sieracki*, 328 U. S. 85, the gear which broke and caused the accident was also found to be defective. In its opinion, this Court made specific reference to the fact that the weight being lifted when the accident occurred was well within the working capacity of the gear involved.

Hawn v. *Pope & Talbot, Inc.*, 346 U. S. 406 and *Rogers* v. *United States Lines*, 205 F. 2d 57, reversed 347 U. S. 984, did not involve accidents arising from use of gear or the vessel for a purpose for which it was not intended. In *Hawn*, the Court of Appeals (198 F. 2d 800) pointed out that the absence of hatch covers in the tween deck of the ship constituted an unseaworthy condition. In the *Rogers* case, the sole question related to the shipowner's liability for the unseaworthy condition of a land fall runner brought aboard by a contractor, and the fact that it was defective was not questioned.

The decision of the Court of Appeals for the Second Circuit in *Grillea* v. *United States*, 232 F. 2d 919, involves an accident resulting from an unseaworthy condition in the ship's structure and does not involve an accident occurring because of a misuse of the ship's equipment.

The decision of the Court of Appeals is also consistent with the principles laid down by this Court in *Mahnich* v. *Southern Steamship Company*, 321 U. S. 96 and *The Osceola*, 189 U. S. 158. In the *Mahnich* case, *supra*, the vessel was found unseaworthy because the gear which

caused the accident was found to be *"inadequate for the purpose for which it was ordinarily used"*. (Italics supplied.) In *The Osceola, supra*, one of the propositions laid down by this Court was that indemnity for unseaworthiness could not be imposed for injuries resulting from the negligence of a fellow servant. *Cf. The Daisy*, 282 F. 261.

The decision of the Court of Appeals is also in conformity with such decisions as *Manhat* v. *United States*, 2 Cir., 220 F. 2d 143, cert. den. 349 U. S. 966; *Freitas* v. *Pacific-Atlantic Steamship Company, Inc.*, 9 Cir., 218 F. 2d 562; *Berti* v. *Compagnie De Navegation Cyprien Fabre*, 2 Cir., 213 F. 2d 397, which involved accidents resulting from use of ship's gear for a purpose for which it was not intended.

Thus, there is no conflict of opinion nor has there been a showing that on the particular facts of this case there are issues of such importance to warrant a review by this Court. The jurisdiction to bring up cases by certiorari was not given for the purpose of merely giving the defeated party in the Court of Appeals another hearing. *Magnum Co.* v. *Coty*, 262 U. S. 159, 163.

(3) Under the guise of seeking a review of the undisputed facts which by application of mathematics required the Court of Appeals to reject the trial court's reasoning that the vessel was unseaworthy, the petitioner seeks to create the impression of a conflict in the facts by resorting to statements having no foundation in the record and on the basis of such statements requests this Court to reverse the Court of Appeals.

The trial court found that the respondent vessel was unseaworthy on the clearly erroneous assumption that the electrical equipment could not safely impose a strain on the runner greater than that designated as the safe working load. It assumed that the safe working load and safe working capacity of gear was one and the same thing.

However, as the Court of Appeals pointed out (249 F. 2d 818) the testimony showed and the laws of physics teach that inertia, frictions and the normal circumstances of operation make it necessary that substantially more than a three-ton strain be imposed upon the gear before a three-ton load can be lifted and thus the electrical equipment must and safely can impose a strain on the runner much greater than the weight to be lifted.

The petitioner's contention that the Court of Appeals was incorrect in reversing the trial court is based on two "alleged" conflicts. The first involves a Coast Guard standard which prescribes the setting for circuit breakers on electric motors, which the Court of Appeals found indicated that the setting of the cut-off device in the present case was safe and proper. Despite uncontroverted testimony to that effect in the record, petitioner by means of an improper and baseless statement set forth as footnote 4 at page 23 of the petition having no foundation in the record attempts to discredit this regulation. It is believed sufficient to say, without pointing out the inaccuracies, that they are baseless and untrue and should not be considered by this Court.

Petitioner's second alleged conflict is equally as baseless because it requires the rejection of the trial court's finding, in which the Court of Appeals concurred, that at the time the topping lift broke it was being subjected to a strain of somewhere between 17 and 21 tons and the substitution of a new finding that the strain then being imposed could not be in excess of 15 tons. In order to arrive at such a conclusion, petitioner not only would require the court to go outside the record but requests it to do under the guise of "taking judicial notice of generally recognized scientific principles".

These "scientific principles" are nothing more than self-serving statements of petitioner which, even if true, furnish no basis for reversing the Court of Appeals on the facts of this case. Petitioner would have it appear that in no event can the safe working capacity of equipment be equivalent to five times the safe working load. While it may be true that there is a practice under which the safe working load of gear is calculated on the basis of one-fifth of the breaking strain, in this case the breaking strain was somewhere between 17 and 21 tons and, therefore, the Court of Appeals was correct in holding that the safe working capacity of the topping lift cable was 15 tons. In order to accept petitioner's contention, it would be necessary not only to reject the holding of the Court of Appeals but also the finding of the trial court that the safe working load of the topping lift cable was *at least* three tons.

Thus, in urging that the reversal by the Court of Appeals was not based upon any evidence in the record and that it was in fact in conflict with all the evidence in the record, petitioner is in error. By resorting to statements outside the record, petitioner himself is guilty of the offense of which he improperly accuses the Court of Appeals. It is clearly evident from this procedure of the petitioner that the Court of Appeals not only correctly applied the standard laid down by this Court in *McAllister* v. *United States*, 348 U. S. 19, but that if it had not it would have committed error. A review of the entire record shows conclusively that there was no evidence to support the findings of the trial judge on the question of seaworthiness and the finding of the trial judge was, therefore, not only clearly erroneous but also contrary to the established law.

(4) Even if petitioner's theory that the rerigging of the boom by the longshoremen, who were his fellow servants, was responsible for the excessive strain on the topping lift could be accepted, it would not entitle petitioner to any indemnity against the vessel.

In *The Osceola*, 189 U. S. 158, one of the propositions enunciated by this Court was that under the general maritime law a seaman had no right to indemnity for injuries resulting from the negligence of a fellow servant. *Cf. The Daisy*, 282 F. 261. It was because under the general maritime law no recovery for injuries resulting from the negligence of a fellow servant, among others, could be had that the Jones Act, 46 U. S. C. A. 688, was enacted. *The Arizona* v. *Anelich*, 298 U. S. 110. Since under the general maritime law a seaman could not recover indemnity for the injuries arising from the negligence of a fellow servant and since the whole rationale of *Sieracki* v. *Seas Shipping Co.*, 328 U. S. 85, rests on the premise that a shipowner cannot escape its obligation under the general maritime law by contracting to have a third party perform the services traditionally performed by seamen, petitioner cannot assert a greater right than seamen have.

CONCLUSION

Petitioner's application for a writ of certiorari should be denied because (1) it seeks a review on theory which was never advanced or passed upon below; (2) it seeks a review on a theory which is in conflict with the findings concurred in by the Courts below and is based on matters having no foundation in the record; (3) it fails to show that under the facts of this case any important reasons exist for the writ; (4) it fails to show that on the facts peculiar to this case there exists any conflict of decisions; (5) under the decisions of this Court, petitioner is not entitled to recovery even under the theory advanced now.

It is respectfully submitted that the petition should be denied.

Respectfully submitted,

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